SUPREME COURT OF THE UNITED STATES.

No. 333.

THE UNITED STATES, PLAINTIFFS,

vs.

NANCY SWAIN.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

1 THE UNITED STATES OF AMERICA, *Massachusetts District, ss:*

Circuit court, October term, 1866.

At a circuit court of the United States begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-six.

Present: the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, assigned to the first circuit, and the honorable John Lowell, district judge.

THE UNITED STATES OF AMERICA,
by indictment,
vs.
NANCY SWAIN.

This is an indictment under the seventy-third sect. of ch. one hundred and seventy-third, acts of Congress of 1864, and the fifth paragraph of the seventy-ninth sect. of the same act, alleging
2 that the defendant, at Boston, in said district, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days since that time, and up to and until the thirteenth day of April, in said year, did knowingly and unlawfully exercise and carry on the trade and business of a retail dealer in liquors, a trade and business for the exercising and carrying on of which a license was then and still is by law required, without having first taken out and without having such a license as was and is in that behalf required by law. The defendant demurs generally to the indictment, and the plaintiffs join in demurrer. The indictment was presented at the May term of said circuit court, begun and

holden at Boston in said district, on the fifteenth day of May, in the year of our Lord eighteen hundred and sixty-six, and the suit was continued to the present time.

The following agreed statement of facts is filed and made a part of the record in said suit, and was considered by the court in con-
3 nection with the defendant's demurrer.

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

Circuit court of the United States of America for the district of Massachusetts.

UNITED STATES, by ind't,
vs.
NANCY SWAIN. } May term, 1866.

Agreed statement of facts submitted to the court to be considered by the court in connection with the defendant's demurrer to the indictment in the above-entitled cause.

1. The several laws and statutes of the Commonwealth of Massachusetts relating to the sale by retail of spirituous and intoxicating liquors may be referred to by either party, and are made part of this case.

2. It is admitted that the defendant was a retailer of spirituous liquors in said Commonwealth, contrary to the laws thereof,
4 at the time laid in said indictment. It is also admitted that the defendant did not belong to any of the classes excepted by the laws of said Commonwealth from the operation of the statutes aforesaid, and permitted to sell liquor by retail in said Commonwealth.

3. It is admitted that under the circumstances aforesaid, the defendant did sell by retail spirituous liquors, at the time and place, in the manner, of the kind, and in the quantities charged in said indictment, without having then and there, and without, at any time, taking out therefor a license from the United States.

(Signed) W. A. FIELD, *U. S. Att'y.*
(Signed) GEO. SENNOTT, *Att'y for Deft.*

This case coming on to be argued this term, the following questions were raised and argued, on all which questions the opinions of the judges were opposed:

1st. Has Congress authority, under the Constitution, to enact a law imposing a tax upon and requiring the taking out of a license by a person for exercising and carrying on the trade and business of
5 a retail dealer in liquors in the manner above stated in the Commonwealth of Massachusetts?

2d. Does the act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, being chapter one hundred and seventy-third of the acts of 1864, require the taking out of a license by the defendant, for exercising and carrying on the trade and business of a retail dealer in liquors, in the manner above stated, in the Commonwealth of Massachusetts?

Whereupon, on motion of the attorney of the United States for said district in behalf of the plaintiffs, it is ordered that the foregoing state of the pleadings, statement of facts, and the foregoing opposition of opinion of said judges upon the questions stated, be certified, under the seal of the court, to the Supreme Court of the United States at their next session, to be held hereafter, to wit: on the first Monday of December, in the year of our Lord eighteen hundred sixty-six.

6 THE UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, Edwin T. Nash, clerk pro tempore of the circuit court of the United States for the district of Massachusetts, do hereby certify the foregoing to be a true copy from the minutes.

Given under my hand and seal of office at Boston, on the 27th day of November, in the year of our Lord one thousand eight hundred and sixty-six.

[SEAL.]

EDWIN T. NASH,
Clerk pro tem U. S. C. C., Mass. Dist.

Supreme Court of the United States.

THE UNITED STAPES, PLAINTIFFS,
vs.
NANCY SWAIN.
} No. 333.

Defendant's Brief.

1. The defendant was indicted in the Circuit of the United States for the District of Massachusetts, at the May term of 1866. The indictment was for retailing spirituous liquors in that state without a United States license, and it was found under section seventy-three of the one hundred and seventy-third chapter of the acts of Congress, enacted June 30th, A. D. 1864.

2. That section affixes a penalty to the "carrying on without a license of any business" for the carrying on of which a license is required by this act.

3. The indictors assume that retailing liquor in Massachusetts is a business for which the act requires a license to be taken out by the retailer.

4. Does not that assumption beg the entire question? The question is, *Does* the act *require* a license for retailing liquor in Massachusetts to be taken by a person in the situation of the defendant? Mere inspection of the act will prove that there is no direct requirement in terms for any person whatever to take out a license for any business in any state where such business is prohibited by such state or by municipal law. It goes even further than that, and provides that in such a places a license, *if granted*, will not exempt the licensee from any punishment affixed to the carrying on of the business, or authorize the commencement or continuance thereof in such place.

5. What then can Congress mean except that lawful business alone shall be licensed, and that unlawful business shall not be licensed at all?

6. This act is a revenue act only. Even if Congress had the power to do so, it is not pretended that they attempt to impose the payment of a license as a punishment to aid a state to enforce its own liquor law.

7. If, then, this act is a revenue act, and if by means of it revenue is exacted from the defendant, the revenue is collected from a criminal business, which is punished by the state at the same time it is taxed by the United States. This consequence appears scandalous.

By statute in the State of Massachusetts it is unlawful and criminal, and punishable by fine and imprisonment in the house of correction, to sell spirituous liquors except under an authority from the state, which it is agreed the defendant did not have.

Gen. Statutes, chaps. 86 and 87.

Keeping a building for the retailing of liquors is punishable by fine and imprisonment.

Gen. Stat., ch. 87, sections 6 and 7.

Liquors kept for sale contrary to law are declared common nuisances, and liable to seizure, destruction, or confiscation.

Gen. Stats., ch. 86, sec. 60.

An officer called the constable of the commonwealth, and a number "of deputies, are created by statute and commanded to especially use their utmost endeavors to repress and prevent other crimes by the suppression of *all liquor shops*, gambling places, and houses of ill-fame."

Laws of Massachusetts—

1865, chap. 249, sec. 2.

1866, chap. 261, sec. 4.

Another law makes it the duty of the judges to see that violators of the liquor laws are promptly sentenced, and forbids district attorneys to *nol. pros.* any cases.

Laws of Massachusetts, 1865, chap. 223, sec. 102.

8. Considering that those laws have been in force for many years, and that Congress gave them special attention

when framing a revenue bill for the nation, the defendant thinks Congress means to license lawful business only, and that unlawful business, particularly if it were also criminal, was not to be licensed at all.

9. There are classes of dealers who can lawfully retail liquors in Massachuseets.

Gen. Stats., ch. 86, secs. 1 to 27 inclusive.

From any of them a license is undoubtedly *required* by the act.

10. Congress cannot constitutionally lay a tax or exact a license on crimes, whether *mala prohibita* or *mala in se*, under the form of a revenue act or in any other way.

11. If a state, by prohibitory legislation, withdraw a large class of articles from taxation, Congress must lose the revenue or protect the citizen.

12. But Congress cannot dictate the domestic law of any state. Nor can it constitutionally enact a law the direct result of which is to compel a citizen to furnish evidence against himself.

(See Amendments, Art. V.)

13. This court have decided, in the case of Maguire, that a United States license is no protection to the licensee against the liquor law of Massachusetts, and have adopted therein the case of Commonwealth vs. Geo. Thorneily.

(3d Wallace, 378, John Maguire's case.)

14. Since then the act itself does not require a license for the unlawful business which defendant carries on, and since Congress cannot enact that crimes shall be licensed, the defendant respectfully asks that the demurrer be sustained.

GEO. SENNOTT,
of Counsel.